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8
9 **UNITED STATES DISTRICT COURT**

10 **DISTRICT OF ARIZONA**

11 C.M., on her own behalf and on behalf of her
12 minor child, B.M.; et al.

13 Plaintiffs,
14 v.
15 United States of America,
16 Defendant.

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No. 2:19-cv-05217-SRB
**PLAINTIFFS' OPPOSITION
TO DEFENDANT'S MOTION
TO SEAL (Dkt. 400)**

1 Plaintiffs oppose Defendant's request to seal Exhibit D and the corresponding
 2 portions of Defendant's Controverting and Supplemental Statement of Facts. *See* Def.'s
 3 Mot. to Seal (Dkt. 400). The excerpted testimony of former CBP Commissioner Kevin
 4 McAleenan is not confidential, and Defendant has not met the "compelling reasons"
 5 standard to seal this material.¹

6 There is a "a strong presumption in favor of access to court records." *Foltz v. State*
 7 *Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). As noted by the Court, a
 8 party seeking to overcome this presumption and file materials under seal in connection
 9 with dispositive motions—such as Defendant's Opposition to Plaintiffs' Motion for
 10 Partial Summary Judgment here—must provide a compelling reason for doing so. *See*
 11 Order Granting Mots. to Seal at 2 (Dkt. 322) (citing *Ctr. for Auto Safety v. Chrysler Grp.,*
 12 *LLC*, 809 F.3d 1092, 1096 (9th Cir. 2016)). Under the "compelling reasons" standard,
 13 Defendant must "articulate compelling reasons supported by specific factual findings that
 14 outweigh the general history of access and the public policies favoring disclosure."
 15 *Kamakana v. Honolulu*, 447 F.3d 1172, 1178–79 (9th Cir. 2006) (quotations omitted).
 16 "[C]onclusory statements about the content of the documents," such as "that they are
 17 confidential" or "that, in general, their production would, amongst other things, hinder"
 18 law enforcement operations, "do not rise to the level of 'compelling reasons' sufficiently
 19 specific to bar the public access to the documents." *Id.* at 1182; *see also Unknown Parties*
 20 *v. Johnson*, 2016 WL 8199309, at *4 (D. Ariz. June 27, 2016) (explaining that "blanket
 21 claims of privacy or law enforcement," such as assertions that disclosure "could impede"
 22 a law enforcement mission, are insufficient).

23 Portions of the testimony Defendant seeks to seal have already been released to
 24 the public: Defendant itself filed pages 335 and 344 of McAleenan's deposition transcript
 25 (which are included in the excerpt Defendant seeks to seal here) on the public record in
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27 ¹ Defendant also asks to seal a direct quote from Plaintiffs' Exhibit 9 contained in the
 28 Controverting Statement of Facts. Plaintiffs' opposition to sealing Exhibit 9 is set forth
 in Dkt. 373 and 373-6 at 3.

1 this case. *See* United States Exhibit A, Attachment 1, McAleenan Dep. at 335, 344, Dkt.
2 372-1. Defendant's current view that the exhibit "contains sensitive, pre-decisional
3 deliberations, addressing the development of immigration policy" is further undermined
4 by the fact that Defendant did not designate lines 340:5–343:25 as confidential under the
5 terms of the protective order. Defendant cannot reverse course now.

6 Defendant's "concern" that release of this testimony would "chill[] candid
7 discussion and deliberation among employees of federal agencies" is also unfounded
8 given that the facts the government now seeks to hide—those surrounding a February 14,
9 2017 meeting, including its attendees and topics discussed—have been widely
10 disseminated through extensive public reporting and public congressional testimony. For
11 instance, *The Atlantic* reported that "[o]n Valentine's Day 2017, Kevin McAleenan, now
12 the acting head of Customs and Border Protection, hosted a large meeting with
13 representatives of CBP, ICE, HHS, and a smattering of White House Hawks." Caitlin
14 Dickerson, *We Need to Take Away Children: The Secret History of the U.S. Government's
15 Family-Separation Policy*, THE ATLANTIC (Aug. 7, 2022), Dkt. 302-6 at 29. Attendees
16 described the meeting as "like a pep really, with two deputies of [ICE Director] Tom
17 Homan's—Matt Albence and Tim Robbins—announcing their plans for securing the
18 border, which included separating migrant families." *Id.* at 30. *The Atlantic* later reported
19 that at the February 14, 2017 meeting, "immigration-enforcement officials presented a
20 nationwide plan to separate families as an immigration deterrent. . . . The plan was also
21 leaked to the media, after which Homeland Security officials began to assert publicly that
22 the idea had been abandoned. In reality, during and after regional separation programs
23 were implemented in Texas, Arizona, and New Mexico, the nationwide plan was still
24 being pushed aggressively by leaders of the immigrant-enforcement agencies, as well as
25 by Stephen Miller, President Donald Trump's chief immigration adviser, and Gene
26 Hamilton, a confidant of Miller's who worked at DHS and the Department of Justice."
27 Ex. A, Caitlin Dickerson, *The Family-Separation Files*, THE ATLANTIC (Dec. 31, 2022),
28 at 2.

1 *American Oversight* further reported that “officials discuss[ed] family separation
 2 as a potential policy option for ending ‘catch and release’” during the February 14, 2017
 3 meeting, that a “focus of the meeting” was “joint DHS, DoJ, and HHS plans for
 4 addressing unaccompanied minors and their parents/sponsors in the U.S.,” that ORR
 5 Commander Jonathan White “recalled the meeting in later congressional testimony,” and
 6 that “the tone of the discussion was ‘If we go this route, we need to be ready.’” Ex. B, *A*
 7 *Timeline of the Trump Administration’s Family Separation Policy*, AMERICAN
 8 OVERSIGHT (Jan. 4, 2023), at 3. Defendant does not explain how granting public access
 9 to the material it cites will have a chilling effect when the circumstances surrounding the
 10 February 14, 2017 meeting are already publicly known.

11 Last, Defendant only vaguely states that there are “law enforcement concerns”
 12 raised by McAleenan’s testimony. Def.’s Mot. to Seal at 3. But Defendant does not offer
 13 any reason, much less a sufficiently compelling or specific one, to justify sealing on this
 14 ground. Defendant does not identify any specific law enforcement concerns, nor does it
 15 explain how the release of this testimony—about a meeting regarding “the development
 16 of immigration policy” that occurred over six years ago and again is very much in the
 17 public domain—could raise law enforcement concerns. *Id.*

18 In short, Defendant fails to meet the “compelling reasons” test to seal the excerpt
 19 of McAleenan’s testimony that Defendant submitted to support its opposition to
 20 Plaintiffs’ Motion for Partial Summary Judgment. Accordingly, Plaintiffs respectfully
 21 request that the Court deny Defendant’s Motion to Seal with respect to Exhibit D.

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1 RESPECTFULLY SUBMITTED this 27th day of April, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2023, I electronically file the foregoing with the Clerk of the Court via the Court's Electronic Filing System, which will provide electronic notification to all filing users.

/s/Lauren Dwyer